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TAGS: UNSC PGOV PREL PTER KCRM SY LE

SUBJECT: LEGAL COUNSEL MICHEL REPORTS OLA/LEBANESE NEAR AGREEMENT ON DRAFT TEXT TO ESTABLISH HARIRI TRIBUNAL

REF: A. BEIRUT 2293

1B. USUN 423

1C. USUN 402

11. (SBU) Begin summary: UN Legal Counsel Nicolas Michel told the P-3 on July 12 that UN lawyers and Lebanese judges Ralph Riachi and Choucri Sadr achieved progress last week in negotiating a draft agreement and statute to establish a tribunal to try those responsible for the assassination of former Lebanese Prime Minister Rafiq Hariri. Michel hoped to travel to Beirut next week to discuss the draft with senior Lebanese officials and did not anticipate the Lebanese would have significant changes to the text. Given the need to consult with key Security Council members after his trip to Lebanon, he did not expect the Secretary-General would submit the draft agreement and statute to the Security Council for approval in July. The agreement would be concluded after the Council authorized the Secretary-General to sign it. Finally, while stressing the need for a Chapter VII resolution to compel third-state cooperation with the tribunal and to establish the primacy of the UN-GOL agreement over Lebanese law, Michel predicted the Russians would not support such a resolution at this stage. Michel also expected that the Secretary-General would extend the contract of Serge Brammertz, Commissioner of the United Nations International Independent Investigation Commission (UNIIIC), by this Friday (July 14). End summary.

12. (U) Michel briefed P-3 lawyers and political officers July 12 on OLA's trip to The Hague July 5-7 to negotiate the text of the agreement and statute establishing the Hariri tribunal with two Lebanese judges. Michel said Antonio Cassese, the first President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and Claude Jorda, formerly an ICTY judge and now a judge on the International Criminal Court, participated in the discussions and made substantial contributions based on their experiences. Michel opened by discussing how OLA thinks the process for establishing the tribunal should proceed and then shared views on substantive aspects of OLA's discussions with the Lebanese judges.

Next Steps in the Process

13. (SBU) Michel said OLA has a "coherent and solid" draft and hopes to travel to Lebanon next week (July 19-20) to present its contents to senior Lebanese officials. The Secretary-General has not approved the trip yet, but once

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Michel gets approval he expects to meet with senior leaders, including the President, the Prime Minister, the Minister of Justice, and the President of the Parliament. Michel stressed he would not go to Beirut to initial or sign the agreement and that the agreement is "not ripe for signature."

Instead, he would travel to hear views from senior officials and political leaders. Michel said the UN's next steps would depend on any comments the Lebanese provide but did not expect any significant additional input. Michel added that OLA has provided Syria with a short summary of the text -- at the SARG's request -- but stressed that OLA is not negotiating the text with Syria.

¶4. (SBU) After the Lebanese assent to the draft agreement and statute -- which he said could take anywhere from a few days to two to three weeks, Michel said OLA would prepare the Secretary-General's report to the Council. That report will

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attach the draft agreement and statute for the Council's consideration. To ensure a successful result, Michel said he was willing to share the draft text with key Council members before submitting it formally. He asked P-3 experts to consider how best OLA could approach the Council tactically to ensure the agreement is received favorably.

¶5. (SBU) Once the Council has concluded its considerations, it would authorize the Secretary-General to sign and conclude the agreement, although Michel said the Council would not necessarily need a resolution to do so. Michel doubted the Russian delegation would support a Chapter VII resolution to compel the cooperation of third states at this stage. Beyond compelling the cooperation of third parties, Michel suggested that a Chapter VII resolution might also be necessary to establish the primacy of the UN-GOL agreement over Lebanese law, especially in the case of constitutional challenges to the agreement's provisions on pardon and immunity. Arguing that such a Chapter VII resolution would be essential at some stage, he urged the P-3 to lay the groundwork carefully

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before presenting that resolution to the Council.

Substantive Questions

¶6. (SBU) Michel said OLA and the Lebanese judges agreed that the tribunal would have jurisdiction over the Hariri case, as well as similar attacks of the "same nature and gravity" committed between October 1, 2004 and December 31, 2005. The tribunal would have jurisdiction over acts of terrorism under Lebanese criminal law -- which Michel cautioned should be seen in the light of Lebanon's adherence to the Arab Convention on the Suppression of Terrorism -- as well as crimes against humanity. Should the investigation determine that the Hariri assassination and the other 14 attacks represented crimes that occurred on a massive scale, Michel said the judges could try perpetrators for crimes against humanity. The French political officer raised several questions and concerns about adding language on crimes against humanity, arguing that it could give the Russians and the Chinese an excuse to object in order to delay establishment of the tribunal. In response, OLA Principal Legal Officer Daphna Shraga argued that without that element, the tribunal would not have an international character. Michel said it would be a "significant omission" to leave crimes against humanity out of the tribunal's jurisdiction.

¶7. (SBU) USUN asked whether the language in the statute concerning the 14 other attacks would create an inconsistency between the tribunal's jurisdiction and UNIIC's mandate and whether the Secretary-General would therefore recommend that the Council expand UNIIC's mandate to include the other attacks before the UNSC authorizes the Secretary-General to sign the agreement establishing the tribunal. Michel said

the question was "difficult" and he would discuss it with UNIIIC Commissioner Serge Brammertz. He said any recommendations the Secretary-General would make about extending UNIIIC's mandate would depend on what Brammertz concludes and thought Brammertz's next report to the Council, due September 15, might be a good opportunity for the SYG to present recommendations about expanding the UNIIIC's mandate.

¶18. (SBU) Michel then discussed the questions of amnesty and trials in absentia, noting that the statute for the tribunal would preclude amnesties for war crimes, genocide, and crimes against humanity. Michel admitted that in doing so, OLA had "pushed the envelope," but thought the amnesty provisions of the text would survive constitutional challenge. The statute permits trials in absentia, but gives a suspect the right to a retrial if the accused had a counsel of his or her choosing or was not present at the first trial and did not instruct the defense counsel appointed by the tribunal during that trial.

¶19. (SBU) The statute also provides creative solutions to incorporate elements of Lebanese civil law with aspects of common law, which provides the underpinnings of all of the other international tribunals the UN has established, Michel said. The tribunal will have a prosecutor, a pretrial judge, a defense office, a trial chamber, and an appeals chamber. The pretrial judge will have an important role. The tribunal's statute also includes measures to permit fair but speedy trials and to protect the rights both of the accused and of victims. The statute also describes rules of procedure and evidence.

UNIIIC and Brammertz

¶10. (SBU) At the end of the meeting, Michel said he expected the Secretary-General would reappoint Serge Brammertz by July 14 and commented on how best to achieve the transition between the UNIIIC's investigation and the work of the tribunal. Michel said Bruno Stagno, President of the ICC Assembly of States Parties (and Costa Rican Foreign Minister), told him the deadline for ICC States Parties to object to Brammertz's reappointment had passed. Even so, the Secretariat of the ICC Assembly of States Parties wanted to

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discuss the issue with the ICC Bureau when they meet this week so the ICC Bureau could make the final decision.
(Comment: The French legal adviser then expressed some frustration at Stagno's proposal, noting that no ICC State Party had objected to Brammertz's reappointment and that the members of the ICC Bureau are also ICC States Parties. End comment.)

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Funding and Location

¶11. (SBU) Michel said OLA and the Lebanese had yet to resolve questions about the tribunal's location or its financing. He said the UN had heard objections from "various actors" to using Cyprus as a location for the tribunal, but he did not specify other options. On funding, Michel said the Secretariat would present options to the UNSC for its consideration. He noted Lebanese assurances that funding would not be a problem "even if the cost of a tribunal exceeded USD 100 million" but wondered how the GOL would be able to pay this bill without any funding from the Hariri family (which he emphasized must be a redline for the international community). Even if the GOL can come up with significant funds for the tribunal without help from the Hariris, Michel cautioned that the UN Comptroller might recommend that Lebanon contribute no more than 49 percent of

the total cost -- lest it appear that the GOL could exert
undue influence over the tribunal.

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